No. 18-3052

IN THE
United States Court of Appeals
for the District of Columbia Circuit

IN RE: GRAND JURY INVESTIGAITON

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
GRAND JURY ACTION NO. 18-34 (BAH)

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC* WITH SUGGESTION OF MOOTNESS

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Date: April 12, 2019

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RULE 35(b) STATEMENT

This petition raises three questions of exceptional importance under the Appointments Clause of Article II, § 2, of the Constitution:

1. Whether Congress "established by law" the appointment of a private attorney to serve as a special counsel as an "Officer of the United States."

2. Whether Special Counsel Robert S. Mueller, III, was unconstitutionally appointed because he is a "principal officer" and thus was required to be—but was not—appointed by the President with the Advice and Consent of the Senate.

3. Whether the Special Counsel was unconstitutionally appointed as an inferior officer because he was required to be —but was not— appointed by then-Attorney General Jeff Sessions, the "Head of Department," rather than by Deputy Attorney General Rod Rosenstein.

The Appointments Clause is "among the significant structural safeguards of the constitutional scheme." *Edmonds v. United States*, 520 U.S. 651, 659 (1997).

I. SUGGESTION OF MOOTNESS

Introduction

It is black letter law that federal courts must be satisfied that a case or controversy exists "through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("an actual controversy must be extant at all stages of review"); *Alvarez v. Smith*, 558 U.S. 87 (2009); *Coal. of Airline Pilots Ass'ns v. F.A.A.*, 370 F.3d 1184, 1189 (D.C. Cir. 2004).

As will be discussed, events that occurred during the course of this appeal render this constitutional challenge to the grand jury subpoena issued by the Special Counsel to be no longer a live controversy, and may not have been so while the case was *sub judice.*

First, after this case was argued on November 8, 2018, but while it was *sub judice*, the Special Counsel indicted Roger J. Stone on January 25, 2019. The general rule is that a grand jury may no longer be used to obtain evidence from witnesses, such as appellant Andrew Miller, a former aide to Mr. Stone.

Second, after the decision was rendered in this appeal on February 26, 2019, but while the mandate was withheld to allow for the filing of the instant petition, Special Counsel Mueller completed his investigation and issued his final report to

the Attorney General on March 22, 2019. Thus, no further indictments are expected. Mr. Stone's prosecution and this case will now be handled by the U.S. Attorney's Office instead of the Special Counsel's Office, which originally issued the subpoena to Mr. Miller.

Accordingly, this Court should invite the government's views to verify whether this case continues to be a live controversy before this Court exercises its judicial power to adjudicate the instant petition for rehearing and suggestion for rehearing *en banc,* and before it decides whether to issue or continue to withhold the mandate, should it deny the petition, while further review in the Supreme Court is sought. Alternatively, the Court may determine that *vacatur* of its opinion and judgment may be warranted. See *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

Chronology of Events Suggesting Mootness

1. In mid-May 2018, Mr. Miller, a former part-time aide to Mr. Stone during the 2016 Republican National Committee convention handling his media schedule appearances, voluntarily agreed to be interviewed without counsel by two FBI agents who appeared without notice at his mother's home in St. Louis, Missouri. For approximately two hours, Mr. Miller answered all their questions to the best of his knowledge. At the end of the interview, the FBI gave Mr. Miller a subpoena

from the Special Counsel for any documents related to Mr. Stone and to testify before the Special Counsel grand jury.

2. At a subsequent hearing on a motion to quash for overbreadth, the parties agreed with court approval to limit the document search to any documents related to Mr. Stone and WikiLeaks, Julian Assange, and Guccifer 2.0. All such documents were turned over to prosecutors on June 25, 2018. The subject of his grand jury testimony, then scheduled for June 29, 2018, presumably would cover the same subject matter as the FBI interview and the documents requested, even though Mr. Miller's knowledge of Mr. Stone's connection to WikiLeaks is limited to published press accounts.

3. While this appeal of the contempt order was pending *sub judice*, Roger Stone was indicted on Friday, January 25, 2019. He was charged with providing false testimony to Congress regarding his contacts with WikiLeaks, Julian Assange, and other witnesses, but there were no charges for colluding or coordinating with Russia regarding that country's interference with the 2016 campaign or the hacking of Hillary Clinton and DNC emails.

4. Later that afternoon, undersigned counsel for Mr. Miller inquired of the Special Counsel whether, in light of the indictment, the grand jury still needed his testimony regarding the subject matter, if it ever did, and whether this Court should be so advised with a FRAP Rule 28(j) letter. In particular, counsel noted the

Justice Department's policy[1] and relevant case law regarding the proper use of the grand jury post-indictment:

> U.S. Attorney Manual **9-11.120 - Power of a Grand Jury Limited by Its Function**
>
> The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. *Costello v. United States*, 350 U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976), *cert. denied sub nom., Hurt v. United States*, 429 U.S. 1062 (1977). Nor can the grand jury be used solely for pre-trial discovery or trial preparation. *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972). After indictment, the grand jury may be used if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Subpoena Duces Tecum, Dated January 2, 1985*, 767 F.2d 26, 29-30 (2d Cir. 1985); *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir. 1978).[2]

5. Since the subpoena issued to Mr. Miller was for the purpose of obtaining evidence related to Mr. Stone's connection with WikiLeaks, Julian Assange, and Guccifer 2.0, it would appear that the Special Counsel would no longer need Mr. Miller's testimony regarding that subject matter. Nevertheless, the next business

[1] The Special Counsel is required to comply with all Department of Justice policies and directives. 28 C.F.R. 600.7(a).

[2] See also *United States v. (Under Seal)*, 714 F.2d 347, 349 (4th Cir. 1983) ("[P]ractices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden. This includes use of the grand jury. . . as a means of civil or criminal discovery."); *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1985) ("universal rule that prosecutors cannot utilize the grand jury solely or even primarily for the purpose of gathering evidence in pending litigation.").

day, Monday, January 28, 2019, undersigned counsel was advised by the Special Counsel's office that it believed the case to be a live controversy since the grand jury was still active, though it was not apparent whether the grand jury or its foreperson was consulted as to any continued interest in hearing Mr. Miller's testimony.[3]

6. On March 22, 2019, Special Counsel submitted his final report to Attorney General Barr pursuant to the Special Counsel regulations, 28 C.F.R. 600.8(c), concluding his investigation, explaining his prosecutions and declinations, and finding that no conspiracy or coordination took place between the Trump campaign or any aides associated with the campaign and Russia regarding interference with the 2016 campaign or hacking the emails of Hillary Clinton or the DNC.[4] No further indictments are expected. According to Justice Department spokesperson Kerri Kupec, "The investigation is complete."[5] Thus, like

[3] Notably, while the mandate was stayed as is the usual practice until 7 days after the time for the filing a petition for rehearing had expired or after disposition of any timely filed petition (45 days from the decision, or April 12), the Special Counsel had the right to ask the Court to issue the mandate ever since February 26 if Mr. Miller's testimony was needed. The Special Counsel declined to do so.

[4] See Attorney General William P. Barr Letter to Congress, March 24, 2019. https://www.nytimes.com/interactive/2019/03/24/us/politics/barr-letter-mueller-report.html?module=inline#g-page-1.

[5] Devlin Barrett and Matt Zapotosky, *"Mueller report sent to attorney general, signaling his Russia investigation has ended"* Washington Post (Mar. 22, 2019).

Cinderella's carriage that turned into a pumpkin at midnight, Special Counsel Mueller's authority expired.

Accordingly, the intervening events described above that have occurred since the issuance of the subpoena in question over nine months ago, strongly, if not definitively, demonstrate Mr. Miller's testimony regarding Mr. Stone is no longer required nor can be legally obtained. Thus, this Court should invite the government's views to verify whether this case continues to be a live controversy or is moot to assure itself that it continues to possess judicial power to adjudicate the instant petition for rehearing and suggestion for rehearing *en banc* and any subsequent action in this appeal.

II. The Panel Erroneously Concluded That Special Counsel Mueller is Not a Superior Officer

After scores of pages devoted by the parties to briefing in-depth the issue of whether the Special Counsel is a superior or inferior officer, not to mention the 41 pages with 21 footnotes penned by Chief Judge Howell on that issue in her voluminous 92-page opinion (Mem. Op. 26-66), the panel gave short shrift to this argument in just two pages (Op. 7-9). The panel declared that "[b]inding precedent

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https://www.washingtonpost.com/world/national-security/mueller-report-sent-to-attorney-general-signaling-his-russia-investigation-has-ended/2019/03/22/b061d8fa-323e-11e9-813a-0ab2f17e305b_story.html?utm_term=.6d83a9475bca

instructs that Special Counsel Mueller is an inferior officer under the Appointments Clause." Op.7.

The essence of the panel's truncated discussion of this complex constitutional issue is that since the "limitations on the Attorney General's oversight and removal powers" in the Special Counsel regulations[6] or their incorporation into Rosenstein's appointment order -- which limitations would otherwise suggest he *is* a principal officer -- can *theoretically* be revoked, therefore, "the Special Counsel effectively serves at the pleasure of an Executive Branch officer who was appointed with the advice and consent of the Senate." Ergo, he is an inferior officer, even though the regulations currently remain extant and binding. This conclusion is erroneous for reasons argued at length in Miller's briefs on the merits. (Opening Br. 14-30; Reply Br. 17-24).

[6] The panel erroneously refers to the "Office of Special Counsel regulations." Op. at 8. There is no "Office of Special Counsel." The regulations merely provide for rules governing the conduct of a Special Counsel who may be appointed by the Attorney General on a case-by-case basis. 28 C.F.R. 600, *et seq.* The pleadings and process in these cases are filed and issued by the "Special Counsel Office." This may seem like a trivial distinction in nomenclature, but as some have argued, because there is no continuous office, the Special Counsel may be a "mere employee" unlawfully exercising "significant government authority." *See* Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an "Officer of the United States" or an "Employee of the United States"?*, Lawfare: Hard National Security Choices (July 23, 2018). https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states

The "binding precedent" cited by the panel for their summary conclusion was *Edmond v. United States*, 520 U.S. 651, 663 (1997) and *In re Sealed Case,* 829 F.2d 50 (D.C. Cir. 1987). But if the test for inferior officers were simply that they may be answerable to a superior, then all officers below the Attorney General, including the Deputy Attorney General, Solicitor General, and Assistant Attorneys General, as well as all other sub-cabinet positions in all other departments, would all be classified as "inferior officers," leading to the implausible conclusion that the Framers intended that only Heads of Departments are to be superior or principal officers requiring Senate confirmation.[7] Justice Souter recognized this problem in *Edmond* when he said "[i]t does not follow, however, that if one is subject *to some supervision and control*, one is an inferior officer. Having a superior officer is necessary for inferior officer status, but not sufficient to establish it." *Id*. at 667 (Souter, J., concurring in part and concurring in the judgment) (emphasis added).

More troubling, the panel failed to cite this Court's more recent opinion in *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1337 (D.C. Cir. 2012), which applied the three *Edmond* factors for determining principal officer status. As Miller amply demonstrated in his briefs, the enormous powers

[7] *See generally* Steven G. Calabresi & Gary Lawson, "*Why Robert Mueller's Appointment As Special Counsel Was Unlawful,"* Northwestern Public Law Research Paper No. 19-01 (last update Mar. 9, 2019) (forthcoming Notre Dame Law Rev.) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324631.

wielded by Special Counsel Mueller as a U.S. Attorney-at-Large exceeded the powers wielded by the Copyright Royalty Judges that this Court found to constitute principal officers. Opening Br. 19; Reply Br. 20, 22. If setting royalty rates "can obviously mean life or death for firms," *id*. at 1338, then returning indictments, criminal prosecution, convictions, and incarceration can mean "life, liberty, and reputation," a far more serious consequence, in addition to financial ruin for those targeted by the Special Counsel.

In short, either the panel or the full Court should rehear this appeal because the panel failed to give proper consideration to post-*Edmond* jurisprudence in assessing whether Mueller is a principal or superior officer under Article II.

III. The Panel Erroneously Concluded That 28 U.S.C. Sections 515 and 533(1) Authorize the Appointment of a Private Attorney to be Special Counsel

As it did with disposing of Miller's Principal Officer argument, the panel held that the issue of whether 28 U.S.C. 515 and 533(1) authorized the appointment of a Special Counsel was decided by the Supreme Court in *United States v. Nixon,* 418 U.S. 683 (1974) and this Court's decision in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987). Op. 9-12. It did so without applying any of the well-settled rules of statutory construction employed by the Supreme Court and this Court as argued at

length by Miller and Amicus Concord Management, LLC.[8] Moreover, the panel's reliance on those two cases as dispositive holdings, which themselves were also bereft of any analysis of the two statutory provisions, was misplaced. Accordingly, the panel or the full court should rehear this appeal.

United States v. Nixon. The panel cited to one sentence in *Nixon* that Congress vested in the Attorney General "the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. 509, 510, 515, 533." As amply demonstrated in our briefs, and undisputed, that statutory issue was neither briefed nor argued by the parties before the Court but instead was assumed. The panel nevertheless rejected the argument that this was dictum, and further relied on this Court's decision in *United States v. Fields*, 699 F.3d 518, 522 (D.C. Cir. 2012), for the proposition that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." Op. 10. The statutory provisions in question were not considered by the High Court at all, let alone "carefully considered."

In re Sealed Case. The panel similarly relied on this Court's *Sealed Case*, which, like *Nixon*, also did not analyze the two provisions in question (indeed, 28

[8] See Opening Br. 7-13; Reply Br. 2-13; Concord Br. 2-13 *See also* Calabresi & Lawson, *supra*, at 16-54.

U.S.C. 533(1) was nowhere mentioned), and which held that while Section 515 "do[es] not explicitly authorize the Attorney to create an Office of Independent Counsel virtually free of ongoing supervision, we read [it] as accommodating the delegation at issue here." Op. 11. While the Attorney General can "delegate" his powers only to those already *inside* the Department, the panel rejected Miller's argument to that effect, holding that the Court in *Sealed Case* "assumed the independent counsel did not already hold a position inside the Department" when he was appointed. Op. 12.

Because this Court in *Sealed Case* candidly acknowledged that Section 515 does not "explicitly authorize" the appointment of a special counsel, and which implicates important constitutional structural constraints, the panel was obliged to consider another rule of statutory construction, namely, that Congress speak in a "clear statement" as Miller argued below and on appeal. The panel's refusal to consider that rule of statutory construction, purportedly because it was only raised in "cursory" fashion and "forfeited," Op. 12, was factually and legally erroneous.

Miller repeatedly and expressly asserted the need for a clear statutory language that implicate Article II's appointment authority in his opening brief. *See* Br. at 5 ("clear language…is required"); at 7 (laws "must clearly state"); at 8 ("clear and specific statutory authorization" required); at 14 ("only Congress can

overcome [Art. II's default rule of appointments with Senate confirmation] with a statute that *clearly* confers appointment authority on the President, the courts, or the "Heads of Departments") (emphasis in original); and further cited other statutes as examples clearly providing for the agency's appointment authority.

The government was not prejudiced by Miller's purported "cursory" treatment of the need for a clear legislative statement since it countered that the language of Section 533 and 515(b) "would easily satisfy it." Govt Br. 40, n.8. Considering the voluminous briefing by the parties on the meaning of these two statutes, the government's four-word conclusion is preposterous on its face. Moreover, the cases cited by the panel for waiver are clearly inapposite. The panel was not called upon to do "counsel's work" as it was in *New York Rehab. Care Mgmt., LLC v. NLRB,* 506 F.3d 1070, 1076 (D.C. Cir. 2007), inasmuch as Miller and amicus plumbed the depths of the rules of statutory construction to divine the meaning of the two statutes, and argued that a clear legislative statement is required. There was no more "counsel's work" for the Court to do other than to either agree with the Special Counsel that the language of two statutory provisions "easily satisfy" the clear statement rule or, as Miller argued, they do not.

IV. The Panel Erred In Ruling That Attorney General Jeffrey Sessions Was Not the "Head of Department" under the Appointments Clause

Even if the panel correctly concluded that there is statutory authority for the appointment of the Special Counsel, and that he is an inferior officer instead of a

principal officer, the panel erred by concluding that he was lawfully appointed by Deputy Attorney General Rod Rosenstein instead of Attorney General Jeff Sessions. This is true even assuming, *arguendo*, that the recusal of Attorney General Sessions from the Russia investigation constituted a single-issue "disability" under 28 U.S.C. 508(a) as the panel concluded.

The panel erred by ruling that the Attorney General's statutory recusal caused him to no longer be the "Head of the Department" for purposes of the Appointments Clause. In doing so, the panel confused Sessions' recusal from the ongoing Russia *investigation* from his constitutional duty to appoint the *investigator*, when it stated, "Under Miller's view, there could be no Attorney General, acting or otherwise, to be in charge of the matter." Op. 14. That is neither Miller's view nor a correct characterization of the matter.

From the time of Sessions' recusal from the Russia investigation on March 2, 2017, the investigation was handled first by then-Acting Deputy Attorney General Dana Boente and then by Deputy Attorney General Rod Rosenstein. They were "in charge of the matter" during Sessions' recusal, whether they were

wearing an "Acting Attorney General" hat or executing their duties as Deputy Attorneys General, even if Sessions had not recused himself.[9]

Moreover, General Sessions could have formally delegated his authority to the DAG under 28 U.S.C. 510 ("Delegation of Authority") to supervise the Russia investigation if that was deemed necessary. The district court also opined that, as an alternative argument to support Rosenstein's appointment authority, Sessions could have delegated his Article II appointment authority to the DAG pursuant to Section 510. (Mem. Op. 90-93).

The Special Counsel did not rely on the Section 510 argument below or in this Court, and probably for good reason. Attorney General Sessions, as the Head of the Department, could no more delegate his *constitutional* appointment authority to appoint inferior officers (as opposed to delegating his *statutory* authorities) any more than the President could delegate his Article II authority to appoint principal officers or inferior officers (if Congress so vested such inferior officer appointments in the president alone). This is true even if the president had a conflict of interest in appointing such officer, such as the head of the General

[9] The Deputy Attorney General is the "Chief Operating Officer" of the Department, provides "overall supervision and direction to all organizational units of the Department," and "25 components and 93 U.S. Attorneys report directly to the Deputy." https://www.justice.gov/jmd/organization-mission-and-functions-manual-attorney-general

Services Administration, who may be a landlord for any real property owned by the president. *Cf. Lucia v. SEC,* 138 S. Ct. 2044 (2018) (SEC Commissioners, as Head of the Department, could not delegate their appointing authority to lower-level employees notwithstanding a general delegation statute, 15 U.S.C. 78d-1(a)).

While the panel discussed at length why the term "disability" in Section 508(a) accords with the usage of the same term in Rule 25(a) of the Federal Rules of Criminal Procedure regarding a judge's recusal from adjudicating a case, Op. 14, it failed to address Miller's argument that in the judicial context, the "rule of necessity," is more analogous to the instant case. Thus, assume there were a law requiring the Chief Judge of a district court to re-assign a case to another judge where the originally assigned judge was recused. If the Chief Judge herself had a conflict in a case originally assigned to her, she would still have the authority and duty to "appoint" another sitting judge to hear the case and still be true to her recusal by not deciding the case. *See* Opening Br. 41 *citing In re Leefe*, 2 Barb. Ch. 39 (N.Y. Ch. 1846) (state *constitution* required that the chancellor alone hear appeals from inferior equity tribunals, and thus decide the case at hand involving a relative that would otherwise require recusal).

Similarly, General Sessions could have appointed a Special Counsel pre-selected by the DAG and still continue to be recused from the investigation. The panel further ignored the Miller's reliance on a relevant OLC opinion (Br. 43) that

while screening of candidates for inferior officers may be handled by subordinates, the Head of the Department must be the appointing authority:

> [A]t a minimum [the Framers] support the view that a head of a department may use subordinates to carry out appointments **so long as the appointment is submitted to the head of the department for approval and made in the name of the head of the department, upon whom ultimate political accountability must rest.**"

29 Op. O.L.C. at 135-36 (emphasis added).

In sum, the panel erred in concluding that Rod Rosenstein, as Acting Attorney General who was supervising the Russia *investigation* following Sessions recusal, was also authorized to be the appointing authority of the Special Counsel as the *investigator*; the constitution reserves that authority to the Head of the Department, Attorney General Sessions.

* * * *

CONCLUSION

For the foregoing reasons, Miller suggests that this case may be moot because of intervening events. If the Court is satisfied that the case is not moot, then it should grant the petition for panel review or the petition for rehearing *en banc*.

Date: April 12, 2019

Respectfully submitted,

/s/ Paul D. Kamenar

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A D D E N D U M

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 8, 2018 Decided February 26, 2019

No. 18-3052

IN RE: GRAND JURY INVESTIGATION

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-gj-00034)

Paul D. Kamenar argued the cause and filed the briefs for appellant.

James C. Martin argued the cause for *amicus curiae* Concord Management and Consulting LLC in support of appellant. With him on the briefs were *Colin E. Wrabley*, *Eric A. Dubelier*, and *Katherine J. Seikaly*.

Montgomery Blair Sibley was on the brief for *amicus curiae* Montgomery Blair Sibley in support of appellant.

Michael R. Dreeben, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were *Robert S. Mueller, III*, Special Counsel, and *Jeannie S. Rhee* and *Adam C. Jed*, Attorneys.

Elizabeth B. Wydra and *Ashwin P. Phatak* were on the brief for *amici curiae* Constitutional and Administrative Law Scholars in support of appellee.

Before: HENDERSON, ROGERS and SRINIVASAN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Andrew Miller appeals an order holding him in contempt for failing to comply with grand jury subpoenas served on him by Special Counsel Robert S. Mueller, III. He contends the Special Counsel's appointment is unlawful under the Appointments Clause of the Constitution, and therefore the contempt order should be reversed. We affirm.

I.

The relevant statutory and regulatory authority relating to the context in which this appeal arises are as follows.

A.

The Attorney General is the head of the Department of Justice ("the Department"). 28 U.S.C. § 503. The Attorney General must be appointed by the President with the advice and consent of the Senate. *Id.* Congress also created the position of Deputy Attorney General, who also must be appointed by the President with the advice and consent of the Senate. *Id.* § 504. Congress has "vested" in the Attorney General virtually "[a]ll functions of other officers of the Department," *id.* § 509, and has empowered the Attorney General to authorize other Department officials to perform the functions of the Attorney General, *id.* § 510. Congress has also authorized the Attorney General to commission attorneys "specially retained under the authority of the Department" as "special assistant to the Attorney General or special attorney," *id.* § 515(b), and provided "any attorney specially appointed by the Attorney

General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal . . . which United States attorneys are authorized by law to conduct," *id.* § 515(a). Congress has also provided for the Attorney General to "appoint officials . . . to detect and prosecute crimes against the United States." *Id.* § 533(1). These statutes authorize the Attorney General to appoint special counsels and define their duties. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 694 (1974).

At various times, independent counsels within the Department have conducted investigations and instituted criminal prosecutions pursuant to the Ethics in Government Act of 1978 ("the Act"). The Act authorized the appointment of an independent counsel upon a referral of a matter by the Attorney General to a three-judge court that could name an independent counsel. *See* 28 U.S.C. §§ 591–599 (expired). In 1999, shortly before these provisions expired, the Department issued regulations to "replace" the Act with a procedure within the Executive Branch for appointing special counsels. *Office of Special Counsel*, 64 Fed. Reg. 37,038 (July 9, 1999); 28 C.F.R. §§ 600.1–600.10. A special counsel is to be afforded wide discretion in the conduct of the investigation while "ultimate responsibility for the matter and how it is handled" resides in the Attorney General. 64 Fed. Reg. at 37,038.

Under Department regulations, the Attorney General establishes the Special Counsel's jurisdiction and determines whether additional jurisdiction is necessary to resolve the assigned matter or matters. 28 C.F.R. § 600.4(a), (b). The Special Counsel is required to "comply with the rules, regulations, procedures, practices and policies of the Department of Justice." *Id.* § 600.7(a). Additionally, the "Attorney General may request that the Special Counsel provide an explanation for any investigative or prosecutorial

step." *Id.* § 600.7(b). And the Special Counsel must notify the Attorney General of important events in the investigation under the Department's Urgent Reports guidelines. *Id.* § 600.8(b). The regulations provide that after review the Attorney General may conclude that a contemplated action is "so inappropriate or unwarranted under established Departmental practices that it should not be pursued." *Id.* § 600.7(b). During review, the Attorney General is to "give great weight" to the views of the Special Counsel. *Id.*

The regulations also address discipline, removal, and the resources for the Special Counsel's investigation. The Attorney General has authority to discipline and to remove a Special Counsel for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies." *Id.* § 600.7(d). The Attorney General establishes the budget for the Special Counsel's investigation, and is to determine whether the investigation should continue at the end of each fiscal year. *Id.* § 600.8(a)(1), (a)(2).

B.

The circumstances giving rise to this appeal began on March 2, 2017, when then-Attorney General Jeff Sessions recused himself "from any existing or future investigations of any matters related in any way to the campaigns for President of the United States." Press Release No. 17-237, U.S. Dep't of Justice, Attorney General Sessions Statement on Recusal (Mar. 2, 2017). Department regulations provide that "no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship" with any person "involved in the conduct that is the subject of the investigation or prosecution." 28 C.F.R. § 45.2. Attorney General Sessions announced in a press release that "[c]onsistent with the succession order for the Department of Justice," the then-

Acting Deputy Attorney General Dana Boente "shall act as and perform the functions of the Attorney General with respect to any matters from which I have recused myself to the extent they exist." Press Release No. 17-237. During testimony before the U.S. House of Representatives Permanent Select Committee on Intelligence on March 20, 2017, then-Director James Comey confirmed that the Federal Bureau of Investigation ("FBI") was investigating the Russian Government's efforts to interfere in the 2016 U.S. presidential election, including investigating the nature of any links between President Trump's campaign and the Russian Government.

On April 26, 2017, Rod J. Rosenstein was sworn in as Deputy Attorney General. By Appointment Order of May 17, 2017, invoking "the authority vested in me as Acting Attorney General, including 28 U.S.C. §§ 509, 510, and 515," General Rosenstein appointed Robert S. Mueller, III, to serve as Special Counsel for the Department to investigate the Russian Government's efforts to interfere in the 2016 presidential election and "related matters" and to prosecute any federal crimes uncovered during the investigation. U.S. Dep't of Justice, Off. of Dep. Att'y Gen., Order No. 3915-2017, Appointment of Special Counsel to Investigate Russian Interference With the 2016 Presidential Election and Related Matters (May 17, 2017) ("Appointment Order"). The Appointment Order stated that "Sections 600.4 through 600.10 of Title 28 of the Code of the Federal Regulations" shall apply to the Special Counsel. *Id.*

Approximately one year later, Special Counsel Mueller issued multiple grand jury subpoenas requiring Andrew Miller to produce documents and to appear before the grand jury. After Miller failed to appear, the Special Counsel moved to compel his testimony and for an order to show cause why Miller should not be held in civil contempt for failure to appear

before the grand jury. Miller filed a motion to quash the subpoenas on the ground that the Special Counsel's appointment violated the Appointments Clause of the Constitution, adopting by reference arguments made in a separate case by Concord Management and Consulting LLC ("Concord Management"), which was also being prosecuted by the Special Counsel. The district court denied the motion to quash and held Miller in civil contempt. *In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 667 (D.D.C. 2018).

II.

On appeal, Miller challenges the authority of Special Counsel Mueller on the grounds that his appointment is unlawful under the Appointments Clause because: (1) the Special Counsel is a principal officer who was not appointed by the President with the advice and consent of the Senate; (2) Congress did not "by law" authorize the Special Counsel's appointment; and (3) the Special Counsel was not appointed by a "Head of Department" because the Attorney General's recusal from the subject matter of the Special Counsel's investigation did not make the Deputy Attorney General the Acting Attorney General. This court's review is *de novo*. *See Recording Indus. Ass'n of America v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1233 (D.C. Cir. 2003).

The Appointments Clause in Article II states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the

> Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

A.

As interpreted by the Supreme Court, the Appointments Clause distinguishes between "principal officers," who must be nominated by the President with advice and consent of the Senate, and "inferior officers," who may be appointed by the President alone, or by heads of departments, or by the judiciary, as Congress allows. *Morrison v. Olson*, 487 U.S. 654, 670–71 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976)). Thus, if Special Counsel Mueller is a principal officer, his appointment was in violation of the Appointments Clause because he was not appointed by the President with advice and consent of the Senate. Binding precedent instructs that Special Counsel Mueller is an inferior officer under the Appointments Clause.

An inferior officer is one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997). In *Edmond*, the Supreme Court applied three factors to determine whether an officer was inferior: degree of oversight, final decision-making authority, and removability. *Id.* at 663–66. According to Miller, those considerations point to Special Counsel Mueller being a principal, rather than inferior, officer because the Office of Special Counsel regulations impose various limitations on the Attorney General's ability to exercise effective oversight of the Special Counsel. But as foreshadowed in this court's opinion in *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), a supervisor's ability to rescind

provisions assuring an officer's independence can render that officer inferior. There, this court recognized that an independent counsel was an inferior officer because his office was created pursuant to a regulation and "the Attorney General may rescind this regulation at any time, thereby abolishing the Office of Independent Counsel." *Id.* at 56; *see Morrison*, 487 U.S. at 721 (Scalia, J., dissenting).

The Attorney General, an officer appointed by the President with the advice and consent of the Senate, has authority to rescind at any time the Office of Special Counsel regulations or otherwise render them inapplicable to the Special Counsel. Unlike the independent counsel in *Morrison*, 487 U.S. at 660–64, whose independence and tenure protection were secured by Title VI of the Ethics in Government Act, Special Counsel Mueller is subject to greater executive oversight because the limitations on the Attorney General's oversight and removal powers are in regulations that the Attorney General can revise or repeal, *see* 5 U.S.C. § 553(a)(2), (b)(A), (b)(B), (d)(3); absent such limitations, the Attorney General would retain plenary supervisory authority of the Special Counsel under 28 U.S.C. § 509. Furthermore, even if at the time of the appointment of Special Counsel Mueller only the Attorney General could rescind the regulations, the Acting Attorney General could essentially accomplish the same thing with specific regard to Special Counsel Mueller by amending his Appointment Order of May 17, 2017, to eliminate the Order's good cause limitations on the Special Counsel's removal (on which Miller focuses particular attention).

In either event, Special Counsel Mueller effectively serves at the pleasure of an Executive Branch officer who was appointed with the advice and consent of the Senate. *See* 28 U.S.C. §§ 509, 515(a), 516; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010);

Appointment Order (May 17, 2017). The control thereby maintained means the Special Counsel is an inferior officer. *See Sealed Case*, 829 F.2d at 56–57. Miller's contention that Special Counsel Mueller is a principal officer under the Appointments Clause thus fails.

B.

The question whether Congress has "by law" vested appointment of Special Counsel Mueller in the Attorney General has already been decided by the Supreme Court. In *United States v. Nixon*, 418 U.S. 683, 694 (1974), the Court stated: "[Congress] has also vested in [the Attorney General] the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533." In acting pursuant to those statutes, the Court held, the Attorney General validly delegated authority to a special prosecutor to investigate offenses arising out of the 1972 presidential election and allegations involving President Richard M. Nixon. *Id.*

Miller contends, unpersuasively, that the quoted sentence in *Nixon*, 418 U.S. at 694, is dictum because the issue whether the Attorney General had statutory authority to appoint a special prosecutor was not directly presented and the Supreme Court did not analyze the text of the specific statutes. It is true that a statement not necessary to a court's holding is dictum. *See City of Okla. City v. Tuttle*, 471 U.S. 808, 842 (1985); *Sierra Club v. EPA*, 322 F.3d 718, 724 (D.C. Cir. 2003); *Martello v. Hawley*, 300 F.2d 721, 722–23 (D.C. Cir. 1962). But Miller misreads *Nixon*, for the Supreme Court was presented with the question whether a justiciable controversy existed. When the Special Prosecutor issued a subpoena to the President to produce certain recordings and documents, the President moved to quash the subpoena, asserting a claim of executive privilege, *id.* at 688, and maintained the claim was

nonjusticiable because it was "intra-executive" in character, *id.* at 689. The Supreme Court held there was a justiciable controversy because the regulations issued by the Attorney General gave the Special Prosecutor authority to contest the President's invocation of executive privilege during the investigation. *Id.* at 695–97. In this analysis, the Attorney General's statutory authority to issue the regulations was a necessary antecedent to determining whether the regulations were valid, and, therefore, was necessary to the decision that a justiciable controversy existed. The Supreme Court's quoted statement regarding the Attorney General's power to appoint subordinate officers is, therefore, not dictum. Moreover, under this court's precedent, "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Fields*, 699 F.3d 518, 522 (D.C. Cir. 2012).

Furthermore, in *Sealed Case*, 829 F.2d at 52–53, this court recognized that the statutory scheme creating the Department vests authority in the Attorney General to appoint inferior officers to investigate and to prosecute matters with a level of independence. There, the Attorney General appointed an independent counsel and promulgated regulations to create an office to investigate whether Lieutenant Colonel Oliver L. North and other officials violated federal criminal law in connection with the shipment or sale of military arms to Iran and the transfer or diversion of funds connected to any sales (referred to as the Iran/Contra matter). The Attorney General also authorized the independent counsel to prosecute any violations of federal criminal laws uncovered during investigation of the Iran/Contra matter. *Id.* at 52. North refused to comply with a grand jury subpoena, arguing that the independent counsel's appointment was invalid. *Id.* at 54–55. This court disagreed:

> We have no difficulty concluding that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the 'investigative and prosecutorial functions and powers' described in . . . the regulation. . . . While [5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515] do not explicitly authorize the Attorney General to create an Office of Independent Counsel virtually free of ongoing supervision, we read them as accommodating the delegation at issue here.

Id. at 55.

The issue before the court was whether the independent counsel was authorized to investigate and to prosecute officials in regard to the Iran/Contra matter. As such, the Attorney General's authority to appoint an independent counsel was antecedent to deciding whether the Attorney General validly delegated authority to the independent counsel. The court's quoted statements regarding the Attorney General's statutory authority to appoint an independent counsel are, therefore, not dicta as Miller suggests.

To the extent Miller incorporates arguments of Amicus Curiae Concord Management, he maintains that in *Sealed Case* this court held only that the Attorney General had authority to delegate powers to an already appointed position inside the Department, not authority to appoint a new special counsel outside of the Department. The court expressly noted that the statutory scheme authorized the Attorney General to delegate powers to "others within the Department of Justice." *Id.* at 55 n.29. Miller is correct that in that case, the independent counsel had two parallel appointments: one from the Attorney General to the Office of Independent Counsel: Iran/Contra and an earlier one from a Special Division under the Ethics in

Government Act, 28 U.S.C. § 593(b). But this court explicitly declined to address whether the independent counsel's initial appointment under the Act was valid, thereby avoiding the need to consider any constitutional questions raised by the Act. *Sealed Case*, 829 F.2d at 55–56, 62; *see* Appellee Br. 34. Therefore, this court assumed that the independent counsel did not already hold a position inside the Department when it held that the Attorney General's appointment of him to the Office of Independent Counsel: Iran/Contra was valid. That analysis applies equally to the facts of the instant case.

Because binding precedent establishes that Congress has "by law" vested authority in the Attorney General to appoint the Special Counsel as an inferior officer, this court has no need to go further to identify the specific sources of this authority. *See generally Grand Jury Investigation*, 315 F. Supp. 3d at 651–58; *see also* 28 U.S.C. §§ 515(b), 533(1). Miller's cursory references to a "clear statement" argument he presented to the district court are insufficient to preserve that issue for appeal and it is forfeited. *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *see United States v. Olano*, 507 U.S. 725, 733 (1993).

C.

The statutory and regulatory scheme demonstrate, contrary to Miller's contention, that at the time of Special Counsel Mueller's appointment, Acting Attorney General Rosenstein was the "Head of Department" under the Appointments Clause as to the matter on which the Attorney General was recused. The Attorney General is the head of the Department of Justice, 28 U.S.C. § 503, and an Acting Attorney General becomes the head of the Department when acting in that capacity because an acting officer is vested with the same authority that could be exercised by the officer for whom he acts, *Ryan v. United*

States, 136 U.S. 68, 81 (1890); *Keyser v. Hitz*, 133 U.S. 138, 145–46 (1890); *see also Acting Officers*, 6 Op. O.L.C. 119, 120 (1982).

Miller's view that the Attorney General's recusal did not make the Deputy Attorney General the "Acting" Attorney General, and, therefore, the Deputy Attorney General lacked authority to appoint Special Counsel Mueller as an inferior officer, ignores the statutory scheme. Section 508(a) of Title 28 provides: "In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office." The word "disability" means the "inability to do something" or "lack of legal qualification to do a thing." *Webster's Third New International Dictionary* 642 (1981). Congress is presumed to use words to have their ordinary meaning absent indication to the contrary. *Russello v. United States*, 464 U.S. 16, 21 (1983); *Perrin v. United States*, 444 U.S. 37, 42 (1979).

Miller would qualify Congress's meaning as limited to a "wholesale absence or disability, not a recusal to act on a single issue." Appellant Br. 36–41. His interpretation is contrary to the structure Congress created for the Department whereby the Deputy Attorney General can carry on when the Attorney General is unable to act on a matter. A statute and Department regulation disqualify any officer or Department employee from participating in an investigation or prosecution that may involve "a personal, financial, or political conflict of interest, or the appearance thereof." 28 U.S.C. § 528; *see* 28 C.F.R. § 45.2(a). Department regulation 28 C.F.R. § 45.2(a) bars involvement where there is a conflict of interest, and then-Attorney General Sessions invoked that regulation as to the investigation of Russia's interference in the 2016 presidential campaign. Hon. Jeff Sessions, Attorney General, Prepared Remarks to the United States Senate Select Committee on

Intelligence (June 13, 2017). At the time of the Special Counsel's appointment then, the Attorney General had a "disability" because he lacked legal qualification to participate in any matters related to that conflict. *See Russello*, 464 U.S. at 21; *Webster's Third New International Dictionary* 642 (1981). Under Miller's view, there could be no Attorney General, acting or otherwise, to be in charge of the matter.

Our understanding of Congress's use of the word "disability" in Section 508 accords with courts' interpretations of Rule 25(a) of the Federal Rules of Criminal Procedure. Rule 25(a) provides that if a judge cannot proceed to preside at a trial due to "death, sickness, or other disability," another judge may complete the trial. Courts have interpreted "disability" to include recusal. *In re United States*, 614 F.3d 661, 661 (7th Cir. 2010); *United States v. Hall*, 171 F.3d 1133, 1153 (8th Cir. 1999); *United States v. Sartori*, 730 F.2d 973, 976 (4th Cir. 1984); *Bennett v. United States*, 285 F.2d 567, 572 (5th Cir. 1960). The authorities Miller cites to support his interpretation — the Vacancies Act of 1868 and *Moog Inc. v. United States*, Misc. No. Civ-90-215E, 1991 WL 46518 (W.D.N.Y. Apr. 1, 1991) — provide no basis to conclude Congress intended a different meaning of "disability" in Section 508(a). In challenging the validity of the analogy on the basis that all federal judges have been appointed by the President with the advice and consent of the Senate, 28 U.S.C. § 133, Miller overlooks that by statute so is the Deputy Attorney General, 28 U.S.C. § 504.

Therefore, the Attorney General's single-issue recusal is a "disability" that created a vacancy that the Deputy Attorney General was eligible to fill. Miller points to no basis on which this court could conclude that Congress did not intend the term "disability" to have its ordinary meaning. *See Russello*, 464 U.S. at 21.

Still Miller maintains that Section 508 does not make the Deputy Attorney General an "acting" officer but only authorizes the Deputy Attorney General to perform the duties of the Attorney General's office and the Attorney General remains the "Head of Department" for Appointments Clause purposes. Congress has authorized the Deputy Attorney General to perform "all the duties of th[e] office" in case of a vacancy, 28 U.S.C. § 508(a), such that the Deputy becomes the "Acting" Attorney General. As to the recused matter, the Acting Attorney General has authority to appoint inferior officers because that is part of the authority that could be exercised by the Attorney General. Miller's position that the Deputy Attorney General only becomes the "Acting" Attorney General if the Federal Vacancies Reform Act, 5 U.S.C. § 3345, is triggered — and that the Act is triggered, he maintains, only upon a complete inability to perform the functions and duties of the Attorney General's office — overlooks that the Act explicitly provides it is not the exclusive means to designate an "acting" official. 5 U.S.C. § 3347(a)(1)(B). Other statutes may temporarily authorize an officer or employee to perform the functions and duties of a specified office. *Id.* Miller does not explain why 28 U.S.C. § 508 is not such a statute that temporarily authorizes an officer to temporarily perform the duties of the Attorney General. *See* S. Rep. No. 105-250, at 15–16 (1998); *see also Noel Canning v. NLRB*, 705 F.3d 490, 511 (D.C. Cir. 2013), *aff'd on other grounds*, 134 S. Ct. 2550 (2014). Therefore, Special Counsel Mueller was properly appointed by a head of Department, who at the time was the Acting Attorney General.

Because the Special Counsel is an inferior officer, and the Deputy Attorney General became the head of the Department by virtue of becoming the Acting Attorney General as a result of a vacancy created by the disability of the Attorney General

through recusal on the matter, we hold that Miller's challenge to the appointment of the Special Counsel fails. Accordingly, we affirm the order finding Miller in civil contempt.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The appellant is Andrew Miller. The appellee is the United States of America. Concord Management and Consulting LLC filed an amicus brief and presented argument supporting appellant. Montgomery Blair Sibley and a group of Constitutional and Administrative Law Scholars filed amicus briefs.

B. Rulings Under Review

The rulings under review include the contempt order issued by Chief Judge Beryl A. Howell against Mr. Miller on August 10, 2018, Case No. 18-gj-34. ECF No. 36. Chief Judge Howell's memorandum opinion and order entered on July 31, 2018, ECF No. 23, denying Mr. Miller's motion to quash the subpoena, is published at 315 F. Supp 3d 602 (D.D.C. 2018).

C. Related Cases

The case has not previously been before this Court or any other court. There was a related case, *United States v. Concord Management & Consulting LLC*, 317 F. Supp. 3d 598 (D.D.C. 2018), appeal docketed, No. 18-301 (D.C. Cir.), appeal dismissed Sept. 17, 2018.

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to FRAP 25(d), the undersigned hereby certifies that on the 12th day of April, 2019, he caused the foregoing Petition for Rehearing and Rehearing *En Banc* With Suggestion of Mootness to be filed electronically with the Clerk of the Court by using CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

The undersigned further certifies that the foregoing Petition complies with FRAP 27(d)(2)(A) and contains 3,900 words, as determined by Microsoft Word 2010 and complies with FRAP 32(a) (5)-(6) because it has been prepared with proportionally spaced font typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/Paul D. Kamenar
Paul D. Kamenar